

In the Matter of Merchant Mariner's No. Z-1004925
Issued to: CARMELO RIVERA

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1364

CARMELO RIVERA

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137911-1

By order dated 20 March 1961, an Examiner of the United States Coast Guard at Long Beach, California suspended Appellant's seaman documents upon finding him guilty of misconduct. The sole specification found proved alleges that while serving as an assistant cook on board the United States SS PRESIDENT HAYES, under authority of the document above described, on 22 May 1960, Appellant wrongfully assaulted and battered pantryman Nathan Edwards with a knife and a length of pipe.

At the hearing, Appellant was represented by counsel. Appellant entered a plea of not guilty to the charge and above specification.

The Investigating Officer introduced in evidence a certified copy of an entry made in the Official Logbook; testimonies of the chief mate, the night cook and baker, and the second cook; various exhibits, and the deposition of pantryman Edwards.

In defense, Appellant offered in evidence various exhibits, the testimony of a waiter on board the SS PRESIDENT HAYES, and his own testimony.

At the end of the hearing, the Examiner rendered the decision in which he concluded that the charge and specification had been proved. The Examiner then entered an order suspending Appellant's document for a period of three months outright plus nine months on twelve months' probation.

FINDINGS OF FACT

On 22 May 1960 Appellant was serving as an assistant cook on board the SS PRESIDENT HAYES and acting under the authority of his document while the vessel was at sea.

At 0630 of that day the pantryman Edwards came to the galley to obtain his usual breakfast supplies. An abusive verbal exchange between Appellant and the pantryman followed, during the course of which Appellant threatened the pantryman with bodily harm. There is evidence in the record which indicates that prior to this time both parties had frequently abused each other with vulgar language. The pantryman left the galley, but returned around 0930 with his unused breakfast supplies. He placed a metal pot containing prunes on a table near where Appellant was at work. Appellant objected and ordered the pantryman to take the prunes to the chill box, which was located at the end of a passageway some thirty feet from the entrance to the galley. Opposite the door to the chill box were racks stacked with pipes. An argument, accompanied by an exchange of vulgar language, ensued immediately between Appellant and the pantryman. However, the pantryman broke off the argument and proceeded to the chill box. As soon as he started along the passageway Appellant, who had been peeling potatoes with a paring knife (the blade of which was approximately three inches long) followed him into the chill box where he cut him in the left palm with the knife and then struck him twice on the left side of his head with a seven foot long copper pipe. Edwards was then hospitalized for approximately one month as a result of the injuries inflicted by Appellant.

Appellant has no prior record during his eight years at sea.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Appellant urges the following two grounds for reversal:

- "1. The testimony of Nathan Edwards (the pantryman) was improperly admitted in evidence.
- "2. The prior record of said Nathan Edwards was not considered by the Hearing Officer."

OPINION

The first ground of appeal appears to be a reiteration of the objections made by Appellant during the course of the hearing. The Investigating Officer introduced into evidence an entry from the Official Logbook of the SS PRESIDENT HAYES which reflected in substance that around 0930 of 22 May 1960 the chief cook notified the master and chief officer of the vessel that the third pantryman Edwards had been cut on the left cheek, left ear and hand by Appellant. The entry further contained the remarks that while the pantryman was being treated by the chief mate, the master went to the galley and apprehended Appellant, and that "immediately

thereafter investigation was held in the master's office and the facts of the case are revealed in the statements attached." Record, Gov. Exhibit No. 3. Appellant objected to the admission of the entry and the attachments which consisted of signed statements of the witnesses, on the ground that they constituted hearsay evidence.

It is now beyond argument that the master's entry of an act, occurrence, or event in the vessel's Official Logbook is one made in the regular course of the ship's business and thus admissible in evidence as an exception to the hearsay rule. See 28 U.S.C. § 1732, 46 C.F.R. § 137.20-107, Commandant's Appeal Decision Nos. 1068, 1049, 980, 903. The sole limitation established by the above regulation is that such evidence is not sufficient standing alone to constitute a prima facie case unless the entry complies substantially with the requirements set forth in 46 U.S.C. § 702. Commandant's Appeal Decisions Nos. 1133, 1027. This code section requires the entry to show that Appellant was given an opportunity to reply to it and that it contained a statement to the effect that either a copy of the entry was given to Appellant or the entry was read to him. The record in the case before me is void as to whether or not he was given an opportunity to reply to it. Therefore, this does not constitute substantial compliance with the statutory requirements of 46 U.S.C. 702. See Commandant's Appeal Decisions Nos. 1068, 1057. It follows that had the Investigating Officer relied solely on the log entry a prima facie case against the Appellant would not have been established. However, the suspension of Appellant's document by the Examiner is supported by other evidence in the record of a substantial character.

Among the evidence introduced by the Investigating Officer are the statements of two witnesses which were objected to as being hearsay. The chief mate testified that while he was administering first aid to the pantryman, Edwards, the latter exclaimed that he was struck by Appellant with a piece of pipe (R. 20). The Chief Cook also testified to a similar statement made to him by Edwards after he had stepped between Appellant and Edwards following the altercation (R. 64). Since the time element between the assault and the statements made to the witnesses is almost negligible and does not suggest any reflection by pantryman Edwards, the statements are admissible under the res gestae exception to the hearsay rule. See 32 C.J.S. Evidence § 403 et seq.

The testimony of pantryman Edwards was introduced into evidence also by a way of a deposition taken pursuant to 46 C.F.R. § 137.20-140. The hearing record indicates that Appellant was given ample opportunity to submit cross interrogatories, but that he failed to do so. As a matter of fact he raised no objections when the deposition was introduced in evidence. In view of this

Appellant may not now raise further objections to the deposition, since such objections are deemed to have been waived.

Appellant's second ground of appeal suggests that the hearing examiner did not take into consideration pantryman Edward's prior record. Appellant makes a reference on page 19 of the Record to the effect that there may exist a "prior felony conviction" of Edwards. It is fundamental in our law that a witness may be impeached and his credibility attacked by proof of conviction of a crime. This crime is usually in the nature of a felony or misdemeanor involving moral turpitude. It is also universally accepted that such conviction must be either shown by actual proof or brought out during cross-examination. See generally 98 C.J.S. Witnesses § 507 et seq. Appellant failed to submit cross-interrogatories to Edwards or to introduce any concrete evidence showing a prior felony conviction of Edwards. Consequently he has failed to sustain the burden of attacking the testimony of pantryman Edwards.

I therefore agree with the Examiner's conclusions that the charge and specification have been proved by substantial evidence. I note, however, that the order of suspension imposed is extremely lenient for this serious offense.

ORDER

The Order of the Examiner dated 20 March 1961 at Long Beach, California is AFFIRMED.

E.J. Roland
Admiral, United States Coast Guard
Commandant

Signed at Washington, D. C., this 31st day of January 1963.